IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

LOREN GLEN HUSS, JR., Plaintiff, vs. LT. STEVE FABER, Defendant.	No. C 00-0186-MWB **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

This action by a prison inmate pursuant to 42 U.S.C. § 1983 comes before the court on the July 2, 2001, Report and Recommendation of Magistrate Judge Paul A. Zoss regarding the defendant's motion to dismiss for failure to state a claim. In his Report and Recommendation, Judge Zoss recommends dismissal of plaintiff Loren Huss's claim that defendant Steve Faber, a corrections officer, retaliated against him for filing inmate grievances by charging him with violations of prison rules. Following an administrative hearing, Faber's charges of various "major" violations of prison rules were reduced to a single "minor" violation for "Obstructive/Disruptive Conduct" for which Huss received a five-day cell restriction. Judge Zoss recommends dismissal of Huss's complaint, because Huss was found guilty of a rule violation charged in the allegedly retaliatory disciplinary report on the basis of "some evidence," which "checkmates" Huss's retaliation claim. On July 16, 2001, Huss, through counsel, filed an "Objection To Report and Recommendation" asking the court to reject the Report and Recommendation and instead to deny the defendant's motion to dismiss.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied,* 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed).

Huss's "Objection" consists, in pertinent part, of the following statements and prayer for relief:

> 1. That Plaintiff has reviewed the Report and Recommendation.
>
> 2. That Plaintiff has no new information to add other than what was submitted with the resistance.
>
> WHEREFORE, Plaintiff requests that the Court deny the motion for summary judgment [sic] and reject the Report and Recommendation by the Magistrate Judge.

Plaintiff's Objection, ¶¶ 1-2 & Prayer. The court is not at all convinced that Huss's Objection sufficiently identifies "those portions of the report or specified proposed findings or recommendations to which objection is made" to invoke *de novo* review. 28 U.S.C.

§ 636(b)(1). However, the court finds that, even upon *de novo* review, there is no error in Judge Zoss's recommended disposition of this case.

As the Eighth Circuit Court of Appeals recently explained, in a case involving a prisoner's claim of retaliation,

> Conduct that retaliates against the exercise of a constitutionally protected right is actionable, even if the conduct would have been proper if motivated by a different reason. *Madewell v. Roberts*, 909 F.2d 1203, 1206 (8th Cir. 1990). Indeed, the retaliatory conduct does not itself need to be a constitutional violation in order to be actionable. "The violation lies in the *intent* to impede access to the courts." *Id.* at 1207 (emphasis in the original).

Cody v. Weber, 256 F.3d 764, ___, 2001 WL 760870 (8th Cir. July 9, 2001) (page references unavailable). Moreover, the Eighth Circuit Court of Appeals has held "that the filing of a false disciplinary charge against an inmate is actionable under § 1983 if done in retaliation for the inmate's filing of a grievance." *See Cowans v. Warren*, 150 F.3d 910, 911 (8th Cir. 1998) (citing *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989)). However, as Judge Zoss rightly explained, where a prisoner alleges that disciplinary action taken against him for conduct unrelated to his grievance was nonetheless taken in retaliation for filing the grievance, the prisoner "may not state a claim of retaliation where the 'discipline [was] imparted for acts that a prisoner was not entitled to perform.'" *Cowans*, 150 F.3d at 912 (quoting *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990) (*per curiam*)). In short, "where an inmate has violated an actual prison rule, no retaliation claim can be stated." *Id.* This is so, even if the sanction for the rule violation was reduced in the administrative process. *See Williams v. Davis*, 200 F.3d 538, 539 (8th Cir. 2000) (*per curiam*). To determine whether an inmate's retaliation claim is precluded, because the punishment was imposed against him on the basis of an actual violation of prison rules, the court examines whether there is "some evidence" supporting the finding of guilt on the

charged rule violation. *See Earnest v. Courtney*, 64 F.3d 365, 367 (8th Cir. 1996) (*per curiam*) (citing *Superintendent v. Hill*, 472 U.S. 445, 454-56 (1985), and holding that "[t]he district court properly concluded—based on McCoy's affidavit and her disciplinary report—that the confidential informants were sufficiently reliable, providing some evidence supporting the finding of guilt"); *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994) ("The prison disciplinary committee found that Henderson committed an actual violation of prison rules based on Officer Baird's description of the event. Because the finding was based on some evidence of the violation, the finding essentially checkmates his retaliation claim. *See Superintendent v. Hill*, 472 U.S. 445, 454-56, 105 S. Ct. 2768, 2773-75, 86 L. Ed. 2d 356 (1985)."), *cert. denied*, 515 U.S. 1145 (1995).

Here, although Faber's charges of "major" violations of several prison rules by Huss were reduced in the administrative proceedings to a "minor" violation of a single prison rule, Rule #27 prohibiting "Obstructive/Disruptive Conduct," the administrative law judge found an actual violation of prison rules by Huss based on Faber's report. *See Williams*, 200 F.3d at 539; *Cowans*, 150 F.3d at 912. The court, like Judge Zoss, finds that there was "some evidence" to support the finding of Huss's guilt on this charge of violating a prison rule, *see Earnest*, 64 F.3d at 367; *Henderson*, 29 F.3d at 469, based on the evidence that Huss did not then, and does not now, deny that he responded to a question from defendant Faber by saying, "Who wants to know?" and that Huss admitted that he told Faber that the Warden of the Anamosa State Penitentiary had given him permission for the purported psychological "research" he was doing, which had prompted Faber's investigation, when in fact Huss only assumed that to be the case. *See* Plaintiff's Supplemental (*Pro Se*) Brief To Resistance To Defendant's Motion To Dismiss, Exhibit 2, Decision of Administrative Law Judge.

This case is distinguishable from *Cody v. Weber*, 256 F.3d 764, ___, 2001 WL 760870 (8th Cir. July 9, 2001), in which the Eighth Circuit Court of Appeals concluded that

the district court had improperly granted summary judgment on a retaliation claim, where the appellate court found that there were genuine issues of material fact as to whether the defendants had retaliated against the plaintiff. *Cody*, 256 F.3d at ___, 2001 WL 760870 (page references unavailable) (Section III). The decision in *Cody* could, perhaps, be read to suggest that a retaliation claim will lie, if there is a genuine issue of material fact as to retaliatory *intent*, even if the disciplinary report would have been "proper," in the sense of otherwise supported by "some evidence," if motivated by a different reason, such as an actual rule violation by the inmate. *See Cody*, 256 F.3d at ___, 2001 WL 760870 (stating, "Conduct that retaliates against the exercise of a constitutionally protected right is actionable, even if the conduct would have been proper if motivated by a different reason," then finding genuine issues of material fact as to retaliatory intent, even though the district court found actual rule violations). However, such a reading would be contrary to settled Eighth Circuit law, as cited above. A more plausible reading of the decision in *Cody*, in light of circuit precedent and the text of the decision, is that genuine issues of material fact as to retaliatory intent in that case arose from incidents that did *not* involve purportedly retaliatory charges of violations of prison rules, so that the district court failed to consider all of the plaintiff's allegations of retaliatory conduct when it granted summary judgment on the plaintiff's retaliation claim on the ground that the plaintiff had failed to provide specific examples of false rule violation reports and had in fact been found guilty of rule violations. *Id.* (noting that the plaintiff submitted "an affidavit setting forth numerous specific incidents" claimed to be retaliatory, including a transfer to the mental health unit, which a prison employee purportedly told the plaintiff was made "to convince him not to 'use the system,' implying that he was being punished for his legal activities"). Here, unlike the retaliation claim in *Cody*, Huss's claim of retaliation is premised solely on charges of rules violations arising from a single incident. Thus, Huss's retaliation claim cannot go forward, where he was found guilty of a rule violation arising from that incident,

even if the sanction was reduced to a single "minor" violation. *See Williams*, 200 F.3d at 539; *Cowans*, 150 F.3d at 911-12.

Huss contends that the reduction of the charges of multiple "major" violations to a finding of a single "minor" violation is a transparent face-saving measure, which does not eliminate the retaliatory nature of defendant Faber's conduct. Huss also contends that whether or not he can state a claim should not depend upon whether prison officials found a rule violation, because to do so gives those officials a way to establish immunity or "umbrella protection based on their own administrative findings." Plaintiff's Supplemental (*Pro Se*) Brief To Resistance To Defendant's Motion To Dismiss at 3. However, because a court confronted with a retaliation claim based on charges of prison rules violations pierces the administrative findings to the extent of determining whether there is "some evidence" supporting the finding of a violation, *see Earnest*. 64 F.3d at 367; *Henderson,* 29 F.3d at 469, prison officials are not given unlimited power to escape liability for retaliation or to "save face" by finding rules violations or one charged rule violation out of several. The situation would probably be different, if the administrative proceedings resulted in a finding of guilt on only *one* charge as to a *single* incident out of *several* charges based on *a series* of incidents, because in those circumstances, all of the rejected charges as to other incidents would be "false," and hence retaliatory. Where, as here, the multiple charges arose from a single incident, however, the disciplinary report was not "false," but simply involved "overcharging" of conduct that was indeed found to violate at least one prison rule. The "overcharging" alone does not provide a basis for a retaliation claim under prevailing circuit law. Moreover, Huss still does not contend that the administrative law judge's finding that he was guilty of a rule violation, albeit only a "minor" one, was not based on "some evidence," and indeed, does not now deny the conduct upon which the "minor" rule violation was found. Consequently, in this case, Huss's retaliation claim is indeed "checkmated" by an administrative finding, on the basis of "some evidence," that Huss

violated a prison rule as charged in the purportedly retaliatory disciplinary report. *See Williams*, 200 F.3d at 539; *Cowans*, 150 F.3d at 911; *Earnest*, 64 F.3d at 367; *Henderson*, 29 F.3d at 469.

Finding no error in Judge Zoss's Report and Recommendation, the court **overrules** Huss's objection and **accepts** Judge Zoss's July 2, 2001, Report and Recommendation. Therefore, Huss's complaint is **dismissed** pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Judgment shall enter accordingly.

IT IS SO ORDERED.

DATED this 21st day of August, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA